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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

SAMUEL M. ATKINSON, ET AL., *Petitioners*,

v.

SINCLAIR REFINING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is primarily a federation of national and international labor unions, which have approximately thirteen million members. As the principal spokesman for organized working people in this country, the Federation is greatly concerned that in the development of our national labor policy a proper balance of power be struck between labor and management, and the stability of industrial relations not jeopardized by needless bitterness and dissension.

The present case involves an almost unprecedented situation: an attempt by an employer to hold his individual employees liable at law for money damages for their participation in a peaceful work stoppage, allegedly in violation of a no-strike clause in a collective bargaining agreement. The Federation feels firmly that the upholding of such a cause of action would be a calamity for American labor relations.[1]

Individual and union petitioners in No. 430 will naturally concentrate in their brief on the peculiar facts of this particular case and on the applicability of specific legal precedents. We propose to emphasize general considerations of labor policy and current theories of the legal nature of the collective bargaining agreement. For the AFL-CIO and the employees represented by its affiliated unions are vitally interested in having the Court view this case in the broadest perspective and with a full awareness of the deep implications its decision will have for the institution of collective bargaining.

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[1] The Federation is equally concerned with seeing the union position sustained on the basic issue posed by the consolidated case, *Sinclair Refining Co.* v. *Atkinson*, No. 434, October Term, 1961. We are in full accord with the Court of Appeals below, which held that the Norris-LaGuardia Act prevents a federal court from enjoining peaceful work stoppages regardless of whether such conduct involves a breach of contract (R. 76-78). Our views on this general question have already been set before the Court in our *amicus* brief in *Teamsters Local 795* v. *Yellow Transit Freight Lines*, No. 13, October Term, 1961. We will only add that the arguments against allowing an injunction in that case apply here *a fortiori*. In *Yellow Transit* an employer sought an injunction against a pending strike; in the instant case the employer sought an injunction operating *in futuro* (R. 77; see R. 18). Furthermore, insofar as the employer here attempted to enjoin not only the union but also individuals, under the court's diversity jurisdiction (R. 14, 18, 77), there would not even be available the argument that sec. 301 of Taft-Hartley in authorizing employer suits against unions on collective contracts effected an implied *pro tanto* repeal of Norris-LaGuardia.

ARGUMENT

Precedent provides few guidelines for the resolution of the legal issue we are considering in this case. We turn first to basic labor policy to support our proposition that individual employees should not be held liable at law for money damages for engaging in a peaceful work stoppage in alleged violation of a no-strike clause in a collective bargaining agreement. Introducing such individual liability is wholly unnecessary for the preservation of responsible collective bargaining. On the contrary, it is diametrically opposed to the best of both theory and practice in modern industrial relations, which are grounded on the notion of collective rights and collective obligations. Moreover, the imposition of legal liability on individual employees for peaceful concerted activities such as strikes or picketing conflicts with the policies embodied in our national labor laws, and should be deemed beyond the power of either the federal or state courts. Finally, the conclusion that individual employees should not be subject to damages for breaching a no-strike clause in a union contract is entirely consistent with, if not demanded by, the various legal theories which have been advanced to explain the nature and effect of a collective agreement.

I. Allowing Damage Actions Against Individual Employees For Peaceful Work Stoppages Is Unnecessary To Maintain Responsible Collective Bargaining And Is Contrary To Both Sound Principles And Sound Practices In Industrial Relations.

A. The Needs of Responsible Collective Bargaining

The institution of collective bargaining has never functioned more effectively than in these early years of the 1960s.[2] Labor historian Foster Rhea Dulles comments that

[2] We refer to situations in which the employer has accepted the union's role, and meaningful relationships have been established. The general pattern of union organization and recognition still leaves room for vast improvement.

"the general observance of union contracts," among other developments, attests to a "growing sense of responsibility on the part of both management and labor."[3] And a distinguished study group headed by economist Clark Kerr, in reporting on the achievements of collective bargaining as of December 1961, noted specifically: "Wildcat strikes and other disorderly means of protest have been curtailed and an effective work discipline generally established."[4]

The experts' impressions are confirmed by the statistics. Man-days lost through strikes during 1961 equalled 1957's postwar low of 16.5 million, according to the Bureau of Labor Statistics.[5] Meanwhile, a survey by the Bureau of National Affairs of 400 representative collective bargaining agreements in effect as of mid-1960 revealed that 94 per cent of them contained some form of no-strike clause.[6] This amounted to an increase from 85 per cent in 1950.[7]

Apart from the inherent effect of a union's pledged word as a deterrent to work stoppages, no-strike clauses of course provide a basis for employer damage actions, under section 301 of the Taft-Hartley Act, against a union which breaches its agreement. 61 Stat. 156, 29 U.S.C. §185; *United Electrical Workers* v. *Oliver Corp.*, 205 F. 2d 376 (8th Cir. 1953); *Teamsters Local 25* v. *W. L. Mead, Inc.*, 230 F. 2d 576 (1st Cir. 1956), *cert. den.* 352 U.S. 802; *Drake Bakeries* v. *American Bakery Workers Local 50*, 287 F. 2d 155 (2d Cir. 1961), *cert. granted* January 22, 1962, No. 598, October Term, 1961.

Insofar as a union itself violates a no-strike clause, there-

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[3] Dulles, *Labor in America* 413 (1960).

[4] *The Public Interest in National Labor Policy* 32 (Committee for Economic Development, 1961).

[5] 49 BNA Lab. Rel. Rep. 243 (Jan. 8, 1962); 85 Monthly Lab. Rev. 122 (Jan. 1962).

[6] 47 LRRM 33-34 (1961).

[7] Beatty, *Labor-Management Arbitration Manual* 91 (1960).

fore, an employer can, if he wishes, secure adequate compensation through a damage action against the union. As will be discussed later,[8] however, healthy labor-management relations are not significantly promoted by damage actions of any kind. And employer damage actions against individual employees have made no contribution at all. Indeed, one writer has reported that prior to 1958 a nineteenth century Nebraska decision was the "only case which has been found which allowed such recovery of damages against individual employees for a peaceful strike."[9]

The growth of sound collective bargaining relationships has thus clearly owed nothing in the past to the novel remedy under examination here. And the present times demand no startling innovations. In the absence of any demonstrated need for radical changes or of any compelling legal precedents, judicial inventiveness should proceed cautiously in this area, heeding closely the lessons to be drawn from sound theory and sound practice in the field of industrial relations.

B. Theory and Practice in Industrial Relations

The dean of American labor scholars, John R. Commons, epitomized the modern approach to labor relations when he declared: "This is an age of collective action."[10] Any attempt to apply traditional doctrines of freedom of contract and individual liability in the field of industrial relations would fail to conform, as Professor Neil Chamberlain has warned, to "the institutional premises of the American

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[8] See part I-B *infra*, pp. 6-8.

[9] Comment, "Liability of Employees Under State Law for Damages Caused by Wildcat Strike," 59 Colum. L. Rev. 177, 181 (1959), citing *Mapstrick* v. *Ramge*, 9 Neb. 390, 2 N. W. 739 (1879) ("civil conspiracy"), and sharply criticizing the allowance of a damage suit against individual strikers in *Louisville & N. R. Co.* v. *Brown*, 252 F. 2d 149 (5th Cir. 1958), *cert. den.* 356 U. S. 949 (applying the Railway Labor Act, not a no-strike clause).

[10] Commons, *The Economics of Collective Action* 23 (1950).

scene."[11] Former Professor Archibald Cox pointed up a unique quality of the labor agreement when he remarked: "A collective bargaining contract is made to be broken. The number of people involved, both as employees and as supervisors, makes large and small violations inevitable."[12] The late Dean Harry Shulman elaborated on this latter theme as follows:

> "It must be continuously and sharply remembered that the collective agreement in itself is not the object of the parties' relations, and that its enforcement or administration is not an end in itself—that the quality and success of the administration of the agreement is not measured by the degree of compliance with it, but rather by the degree to which it aids the achievement of just and harmonious operation of the entire enterprise so as to secure what we may call optimum production."[13]

Obviously, the above considerations all indicate that as a matter of policy the relationships created by a collective agreement should be viewed differently from those created by the ordinary contract. On the specific issue of assessing damages in cases involving infractions of the employment relationship, Morris Ernst concluded that money awards "breed nothing but ill will, and have neither the intention nor the result of effecting industrial peace."[14] A committee

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[11] Chamberlain, "Collective Bargaining and the Concept of Contract," 48 Colum. L. Rev. 829, 837 (1948). Individual liability for the performance of a corporation's contractual obligations is of course not the rule for the organization's officers, directors, or stockholders. 3 Fletcher, *Corporations* § 1118, pp. 685-686 (1947).

[12] Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 18 (1958).

[13] 3 *Conference on Training of Law Students in Labor Relations, Transcript of Proceedings* 663 (1947), quoted in Chamberlain, *supra* note 11, 48 Colum. L. Rev. at 840.

[14] Ernst, "The Development of Industrial Jurisprudence," 21 Colum. L. Rev. 155 (1921).

of the American Bar Association echoed that sentiment, stating: "We feel that damage suits are generally not good medicine for labor relations."[15]

Legal commentators have relied on numerous policy grounds in attacking employer damage actions against individual employees for breaching no-strike clauses. One writer has contended that such suits carry the flavor of a discredited period of industrial relations in the past; that they would "inject greater bitterness into labor relations"; that individual employees "might lose their entire life savings at one blow"; and that in the long run the employer would suffer since damage actions "would make future efforts to achieve closer understanding with its employees tremendously more difficult."[16] Another critic adds that "the potentially drastic effect on individuals and the probable intensification of employer-employee antagonism which would ensue from such an action would seem to outweigh any possible advantage of its availability to the employer."[17]

We certainly are not trying to deny employers an adequate remedy against employees who engage in improper work stoppages. But the most effective method of enforcing the anti-strike pledge lies right within the work community itself. One of the nation's leading labor arbitrators, Marion

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[15] See Fulda, "The No-Strike Clause," 21 Geo. Wash. L. Rev. 127, 144 (1952) (Report of the Committee on Improvement of Administration of Union-Employer Contracts, ABA Section of Labor Relations Law).

[16] Givens, "Responsibility of Individual Employees for Breaches of No-Strike Clauses," 14 Ind. & Lab. Rel. Rev. 595, 596 (1961). For general discussions of the bygone era of acrimonious, suit-laden labor relations, see Frankfurter and Greene, *The Labor Injunction* (1930); Witte, *The Government in Labor Disputes* (1932); 1 Teller, *Labor Disputes and Collective Bargaining* §§ 14-30 (1940). *Cf.* S. Rep. No. 163, 72d Cong., 1st Sess., p. 18 (background of the Norris-LaGuardia Act).

[17] Comment, 59 Colum. L. Rev. 177, 189 (1959).

Beatty, puts it this way: "Discipline or discharges followed by the grievance procedure and arbitration are the most common form of reprisal for violation of a no-strike clause and more practical for both sides than is court action."[18] While we cannot subscribe to Dean Shulman's thesis that the courts should stay out of labor-management contractual disputes altogether, we do think that much support for keeping judicial action to a minimum can be found in his observation that "the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government."[19] That would seem most true of all where the courts are asked to fasten financial liability on individual employees.

II. Allowing Damage Actions Against Individual Employees For Peaceful Work Stoppages Is Contrary To The Policy Of Our National Labor Laws.

A. Federal Labor Policy in General

In the instant case the employer purports to ground its action for damages against the individual employees on state substantive law (R. 12, 56-57, 66). Yet the impact of federal law cannot be avoided. Ultimately, any rights the employer may have against its individual employees must be based upon an interpretation and application of the collective bargaining agreement with the union, and the no-strike clause contained therein. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456, establishes that suits on collective contracts under section 301 of Taft-Hartley are to be decided under "federal law which the courts must fashion from the policy of our national labor laws."

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[18] Beatty, *Labor-Management Arbitration Manual* 92 (1960).

[19] Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1024 (1955).

The vast majority of courts which have considered the problem have gone one step further. Federal law alone, they hold, now governs the collective agreements of unions and employers in interstate commerce, even though state courts retain concurrent jurisdiction to apply the federal law. See, *e.g.*, *McCarroll* v. *Los Angeles District Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322 (1957), *cert. den.* 355 U.S. 932; *Ingraham Co.* v. *IUE Local* 260, 171 F. Supp. 103 (D. Conn. 1959); *Minkoff* v. *Scranton Frocks, Inc.*, 172 F. Supp. 870 (S.D.N.Y. 1959); *Swift & Co.* v. *Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959); *cf. Charles Dowd Box Co.* v. *Courtney*, No. 33, October Term, 1961, decided February 19, 1962. This result is necessary. As Professor Harry Wellington remarks, "independent bodies of law should not compete to regulate the primary rights of individuals and organizations."[20]

So however the employer denominates its action, its rights in the end hinge on the "policy of our national labor laws." No express language can be cited in either the federal statutes or the decisions of this Court which is definitely dispositive of the issue here. Nevertheless, we feel it entirely fair to say that the whole trend of recent federal statutory and decisional law in the field of labor relations has been away from the sort of individual liability reminiscent of the days of the *Danbury Hatters*.[21]

Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. §106, eliminated some of the most flagrant abuses by

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[20] Wellington, "Labor and the Federal System," 26 Univ. Chi. L. Rev. 542, 561 (1959). See also Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 653 (1959) ("there will probably be a body of what we might call federal 'common law' adjunct to section 301, which will supersede in the state courts all local state common or statute law").

[21] See *Loewe* v. *Lawlor*, 208 U. S. 274; *Lawlor* v. *Loewe*, 235 U. S. 522.

ensuring that union members would not be liable for the unlawful activity of other union people except upon clear proof of personal participation or authorization. And section 301 (b) of Taft-Hartley provided that money judgments against a union "shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." Of course this does not explicitly negate the right to hold individual employees liable for their own peaceful concerted activities. But we agree with the commentators who have suggested that the quoted language can be interpreted "as an indication that the over-all regulatory scheme of the act reflects a policy unfavorable to individual liability."[22]

In *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470, this Court cited section 301 (b) as evidencing "a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it." A union's breach of a collective agreement therefore could not be used by the employer as a defense against its duty to contribute to an employee welfare fund. In *Wilson & Co.* v. *Packinghouse Workers*, 181 F. Supp. 809 (N.D. Iowa 1960), *Benedict Coal* was relied upon in a suit akin to the present one to support the conclusion that union officers could not be held individually liable for money damages under state tort law for inducing their union to breach its no-strike agreement. We submit that the same philosophy of organizational as distinguished from individual liability favors the conclusion that employees should not be held liable for money damages under either state tort or contract law for inducing or participating in a peaceful work stoppage despite the existence

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[22] Comment, 59 Colum. L. Rev. 177, 187, n. 61 (1959); see also Givens, *supra* note 16, 14 Ind. & Lab. Rev. at 597.

of a no-strike provision in their union's collective agreement.[23]

The employer here will undoubtedly argue that such provisions as section 6 of Norris-LaGuardia and section 301 (b) of Taft-Hartley, and such decisions as *Benedict Coal*, merely indicate that individuals should not be held liable for *union* action, or for other action in which they do not participate. Such authorities, it will be insisted, have nothing to do with the question of individual liability for personal actions. We disagree. It is quite true that these authorities do not logically compel the result we seek in this case. But they do lend firm support to our thesis that in modern times the Congress and this Court have consistently repudiated attempts to impose financial liability on individuals for peaceful concerted labor activities. Whether the rule be framed in terms of absolving individuals of liability for union action, or in terms of imposing an obligation enforceable through damages only on the union and not on individuals, the result is the same and reflects the same underlying philosophy. The ultimate question is whether a no-strike clause in a collective contract places a duty on individual employees enforceable at law through money damages. We are contending at this point that as a matter of federal labor policy the

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[23] The employer here has relied upon a number of alternative theories of liability, sounding in both tort and contract, including allegations of both personal breaches of contract by employees and inducements of breaches on the part of their fellow employees (R. 72-76). We think this multifariousness of rationale adds nothing essential to the cause of action. As has been observed, "if the employees could not be sued as individuals for breach of a no-strike agreement, it would seem illogical to hold them liable for an interference with their employer's business, which interference is unlawful only because of such an agreement. The basic question which would seem to determine either action is whether a no-strike clause imposes upon the individual employee a duty not to engage in or 'foment' a strike." Comment, 59 Colum. L. Rev. 177, 185, n. 49 (1959).

answer should be No. We will later show that as a matter of sound contract theory the answer should likewise be No.[24]

The theory of individual liability also conflicts with fundamental federal policy embodied in section 9 of the National Labor Relations Act, 61 Stat. 143, 29 U.S.C. §159. Under section 9 a majority union is the "exclusive representative" of all the employees in the bargaining unit. To make this status fully meaningful, the union must be able to act as sole agent on behalf of the employees not only in negotiating terms and conditions of employment, but also in litigating with the employer the rights and obligations springing from the collective agreement. This at least is true regarding the collective rights of the work force, as distinguished from such a "uniquely personal right" of an individual as "accrued wages." Compare *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460, 461, with *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448. Nothing could be less a "uniquely personal right" than the right of employees to engage in concerted work stoppages for mutual aid and protection. Yet to accord the employer the power to maintain a damage action against individual employees for participating in a peaceful strike would necessarily seem to imply according those employees the power to compromise and settle the suit on such terms as they, individually, could arrange with the employer. In effect, a judicial proceeding would become the instrument whereby the employer could negotiate with individual employees concerning their right to engage in one of the most crucial of concerted activities and one generally covered in the collective agreement. Few things could more effectively undercut the policy upheld by this Court when it declared in *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338, that the "very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees

[24] See part III, *infra*, p. 16.

with terms which reflect the strength and bargaining power and serve the welfare of the group."[25]

B. The NLRB's Primary Jurisdiction and Federal Preemption

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court laid down the following fundamental principle: "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." See also *Garner* v. *Teamsters Local 776*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

The status of employees striking in alleged violation of a no-strike clause has traditionally been subject to Labor Board regulation. As this Court has held, even the existence

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[25] When Congress wished to allow individual employees or groups to deal directly with their employer regarding rights under a collective agreement, it expressly so provided. Provisos to sec. 9 (a) permit employees "to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative," but the adjustment must not conflict with a union contract. This limited authorization for the direct handling of employee "grievances" plainly does not cover negotiations leading to a compromise settlement of an employer's suit against individual employees for engaging in peaceful concerted activities. See also S. Rep. No. 105, 80th Cong., 1st Sess., p. 24.

In addition to the statutes and decisions discussed in the text, sec. 502 of the Taft-Hartley Act, 61 Stat. 162, 29 U.S.C. §143, has been cited as further authority for the view that it would be contrary to national labor policy to hold individual employees liable for money damages. See Givens, *supra* note 16, 14 Ind. & Lab. Rel. Rev. at 597. Sec. 502 provides *inter alia* that nothing in Taft-Hartley shall make "the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent." *Cf.* Comment, 59 Colum. L. Rev. 177, 182, n. 34 (1959).

of an anti-strike pledge does not necessarily strip the protections of section 7 from employees engaging in peaceful work stoppages. See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 283 (no-strike clause does not waive employees' "right to strike against unfair labor practices"). In the light of *Garmon*, this fact alone should foreclose the sort of action under state tort or contract law which is proposed here. It would be anomalous indeed if an employee were subject to a damage action for engaging in activities which the Labor Board might hold were protected under federal law. But even more basically, peaceful strikes are the very kind of concerted activities which Congress has assigned to the exclusive primary jurisdiction of the NLRB. Therefore, in the absence of such a clear statutory exception as section 301's authorization for employer suits against *unions*, the legality of a peaceful work stoppage should not first be determined in a private suit against individual employees in either federal or state court.

Against our position the contention will be made that an employer may lawfully discharge an employee who violates a no-strike clause under certain circumstances,[26] and that accordingly it cannot be said such an employee remains protected by section 7. This may be too simplistic an analysis. At least two legal commentators have agreed that the extent of section 7 protections may turn not only on the nature of the employee's conduct, but also on the nature of the employer's retaliation. As one of these writers says:

> "Thus, discharge could be viewed as an appropriate and reasonable remedy for an employee's striking in violation of a collective bargaining agreement (and thus not an *unwarranted* interference under §8(a)(1) of the LMRA with rights guaranteed by §7 of the act), while imposition of a heavy judgment for damages could be

[26] See *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332; *Scullin Steel Co.*, 65 NLRB 1294 (1946), *modified and enforced* 161 F. 2d 143 (8th Cir. 1947); *Joseph Dyson & Sons, Inc.*, 72 NLRB 445 (1947).

considered an inappropriate remedy because the intimidating effect might interfere with the purposes for which federal law protects concerted activity."[27] (Emphasis in the original.)

The only proper forum in which to resolve that type of question is the National Labor Relations Board.

It might well be, however, that the issue of federal preemption should not pivot solely on the narrow question of whether a particular activity is either protected or prohibited by the National Labor Relations Act. The majority opinion in *Garmon*, see 359 U.S. at 245, may foreshadow an acceptance by this Court of a broader preemption doctrine along the lines advocated by such scholars as former Professor Cox. For him the NLRA is a "comprehensive code of regulation" in the field of labor-management relations, effecting a "total pre-emption of state laws dealing with unionization and collective bargaining, including resort to peaceful strikes and picketing."[28] In this view, a person

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[27] Comment, 59 Colum. L. Rev. 177, 187, n. 62 (1959); see also Givens, *supra* note 16, 14 Ind. & Lab. Rel. at 598. For Labor Board treatment of employers' state court suits against unions as unfair labor practices, compare *Clyde Taylor Co.*, 127 NLRB 103 (1960), with *W. T. Carter*, 90 NLRB 2020 (1950). *Cf. Halff, d.b.a. Halff Mfg. Co.*, 16 NLRB 667 (1939). The mere "tendency" of state law to impinge on federal rights is sometimes sufficient to invalidate it. See *Smith* v. *California*, 361 U.S. 147, 155.

[28] Cox, "The Labor Decisions of the Supreme Court at the October Term 1957," *Proceedings of the ABA Section of Labor Relations Law* 12, 20-21 (1958); see also "Report of the Committee on State Labor Legislation," *Proceedings of the ABA Section of Labor Relations Law* 133, 136 (1959). This Court has stated that preemption is not affected by any distinction between state laws regulating labor-management relations and state laws of general applicability. *Weber* v. *Anheuser-Busch*, 348 U.S. 468, 479-480. *Cf. Teamsters Local 24* v. *Oliver*, 358 U.S. 283. But even a "total preemption" doctrine would leave room for state law regulating "violence and imminent threats to the public order," or matters of a "merely peripheral concern" to the federal scheme. See *Garmon*, 359 U.S. at 243, 247; see also *Auto Workers* v. *Russell*, 356 U.S. 634; *Machinists* v. *Gonzales*, 356 U.S. 617.

would have a right against nonviolent conduct in the labor-management field under federal law, or, at least so far as state tort law is concerned,[29] he would have no right at all. It goes without saying that federal law grants an employer no remedy of money damages against individual employees who engage in a peaceful work stoppage.

But it is not necessary to reach these broader questions in order to sustain the union's position. The statutes and the decisions we have discussed, and the traditional preemption doctrine exemplified by *Garmon*, are enough. They clearly indicate that "damages against individual employees for peaceful activities in a strike, whether or not in violation of a collective bargaining agreement, or of state or federal law, violate the basic presuppositions of our national labor policies."[30]

III. Legal Theories Regarding The Nature Of A Collective Agreement Support, If They Do Not Demand, The Conclusion That Individual Employees Are Not Liable In Damages Under A No-Strike Clause For Engaging In Peaceful Work Stoppages.

Sound principles and practices in industrial relations, and the policy of our national labor laws, all point to the

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[29] Barring a revision in the views expressed by this Court in *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, a certain body of residual state contract law in the labor field would appear necessary to enable employees to enforce their individual rights under a collective agreement against their employer. Both Professors Cox and Gregory, however, favor giving the union "control over all claims arising under the collective agreement," and excluding "actions by individual employees" in either federal or state courts. See Cox, *supra* note 12, 57 Mich. L. Rev. at 24; Gregory, *supra* note 20, 57 Mich. L. Rev. at 642-643, 652. Now that *Lincoln Mills* has disposed of the constitutional problems underlying much of *Westinghouse*, these views should appear much more acceptable to this Court. See also sec. 301 of Taft-Hartley ("Any such labor organization may sue or be sued as an entity *and in behalf of the employees whom it represents* in the courts of the United States"). (Emphasis added.) *Cf. American Brake Shoe Co.* v. *Auto Workers Local 149*, 285 F. 2d 869, 874 (4th Cir. 1961).

[30] Givens, *supra* note 16, 14 Ind. & Lab. Rel. Rev. at 598-599.

conclusion that individual employees should not be held liable in damages under a no-strike clause for engaging in peaceful work stoppages. It remains to show that this conclusion is consistent with good contract law, as it applies to a collective bargaining agreement.

At least three main theories, along with variants, have been advanced either singly or in combination to explain the legal nature and effect of the collective contract:

1. The union agreement establishes local customs or usages, which are then incorporated into the individual's contract of employment. This was probably the orthodox view in the earlier days of American law,[31] but it comports least well with current thinking on the legal status of the union. In order to account for the recognition now granted to both the union and individuals as possessors of enforceable rights under collective agreements, a refinement of the custom and usage theory posits the existence of two contracts. One contract is made up "partly of promises running to the benefit of the union as an organization * * * and partly of provisions relating to wages, hours and job security which the em-

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[31] See Rice, "Collective Labor Agreements in American Law," 44 Harv. L. Rev. 572, 582 (1931). *Cf. J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-335.

Under English law, collective agreements are considered merely "gentlemen's agreements" or moral obligations not enforceable by the courts. See *Young* v. *Canadian Northern Ry. Co.*, [1931] A.C. (P.C.) 83; Gregory, *Labor and the Law* 446 (1961). Nevertheless, despite a recent wave of strikes, including wildcat strikes, which has swept the country, British employers have gone no further than to recommend that individual employment contracts incorporate a reasonable termination notice binding on both employer and employee. This would mean that "an employee cannot be in breach of his contract by, for example, unofficial strike without risking this security," *i.e.*, his security against summary dismissal. See British National Union of Manufacturers, "Proposed British Charter of Industrial Relations," p. 7 (U.S. Labor Dept. mimeo. release, Dec. 1961). Not even the unsettled labor climate provoked the suggestion of any such extreme measure as holding individual employees liable in money damages.

ployer promises to incorporate in a second * * *—the contract of hire between the employer and the individual employee."[32]

2. The collective agreement constitutes the action of the union in its capacity as agent for the employees whom it represents.[33] The agency theory has the advantage of fitting in semantically with a majority union's acknowledged status under section 9 of the NLRA as collective bargaining representative for all employees in a unit. In its pure common law form, however, the theory could not explain the union's ability to act for employees who were not members. And even now the loss of power by dissident employees in a bargaining unit to act for themselves is "unlike any ordinary principal to an agency relation."[34]

3. A collective agreement is a third party beneficiary contract, with the employer and union the promisors and promisees, and with the employees the beneficiaries.[35] Despite certain shortcomings, the third party beneficiary theory is regarded by Professor Charles O. Gregory as a "great advance" over the other two.[36] Professor Cox, because of his desire to have the union and not individuals enforce rights under a collective contract, prefers a variation of this theory.

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[32] Cox, *supra* note 12, 57 Mich. L. Rev. at 20.

[33] See *Barnes & Co.* v. *Berry*, 169 F. 225 (6th Cir. 1909); 1 Teller, *Labor Disputes and Collective Bargaining* §167 (1940); Gregory, *Labor and the Law* 447 (1961).

[34] Cox, *supra* note 12, 57 Mich. L. Rev. at 6. See also *Brooks* v. *NLRB*, 348 U.S. 96, 103 ("Congress has discarded common-law doctrines of agency").

[35] See *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 ("an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement"); 1 Teller, *Labor Disputes and Collective Bargaining* §168 (1940). *Cf. Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459.

[36] Gregory, *Labor and the Law* 447 (1961).

He would treat the the collective agreement as creating "a trust with a chose in action as the *res*"; the union would hold the "employer's promises in trust for the benefit of the individuals."[37]

The first two of these contract theories are entirely compatible with the result which policy dictates, *viz.*, that individual employees should not be held liable for damages for participating in peaceful work stoppages. The third party theory, now generally the most favored, compels that result.

The usage theory and the agency theory agree in stressing the existence of a contract between employer and employee, separate and distinct from any which may exist between employer and union. And the decisions have consistently recognized that there is a parallel distinction between the collective rights and obligations running between employer and union, and the individual rights and obligations running between employer and employee. Compare *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, with *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448; see also *Machinists Local 2040* v. *Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), *cert. den.* 361 U.S. 884; *MacKay* v. *Loew's, Inc.*, 182 F. 2d 170, 172 (9th Cir. 1950), *cert. den.* 340 U.S. 828.[38] We therefore think it wholly consistent with these contractual theories to regard the no-strike clause as a collective obligation binding only on the union, and not as an individual obligation binding on employees who may engage in a wildcat strike or other peaceful work stoppage. Whether or not the union authorizes the strike should not affect the individual's freedom from personal liability.

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[37] Cox, *supra* note 12, 57 Mich. L. Rev. at 21, 24. *Cf. 2 Trusts 2d Restatement* §§280-282 (1959). Individual employees would be protected by a cause of action against their union if it failed in its fiduciary obligation of enforcing their rights under the collective contract.

[38] Also see Cox, *supra* note 12, 57 Mich. L. Rev. at 20; Note, 44 Va. L. Rev. 1337-1338 (1958).

Emphasizing the effect of the union agreement as establishing a body of working rules, Professor Neil Chamberlain writes: "The union's commitment is to foster continued acceptance; it cannot guarantee performance, since the power of performance lies not within its hands. In this sense, violations of the agreement, when not condoned by the union, constitute no breach of contract."[39] And emphasizing the scope of the union's agency in entering into the agreement, another commentator observes: "The collective bargaining agreement may certainly bind the individual employee in his activities within the job community, but it would not seem to confer authority upon the union to agree, expressly or by implication, that the employee will personally pay money damages to his employer if he breaches the obligations which the union lays down in the collective agreement."[40]

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[39] Chamberlain, *supra* note 11, 48 Colum L. Rev. at 842. Chamberlain adds: "Non-complying employees may be disciplined, as individuals, for their non-conformance with the terms of agreement." *Ibid.*

[40] Givens, *supra* note 16, 14 Ind. & Lab. Rev. at 598. *Cf.* Note, 106 Univ. Pa. L. Rev. 999, 1003 (1958) (arguing that an employer is limited to the penalties spelled out in the contract for violations of a no-strike clause, and "cannot assess a money penalty against the strikers"). Nothing advocated in this brief would prejudice an employer's right to discipline individuals striking contrary to a no-strike pledge. An employer retains his common law power to suspend or discharge employees except insofar at it is limited by statute or contract. A union can in effect waive certain employee rights under sec. 7 by signing a no-strike agreement, see note 26 *supra* and accompanying text, thus leaving the employer free to exercise his traditional disciplinary prerogatives, if otherwise for "just cause." But this is a far cry from saying that a no-strike clause binds individual employees not to engage in peaceful work stoppages under pain of money damages. See also 1 Teller, *Labor Disputes and Collective Bargaining* §169, p. 505 (1940) ("a collective bargaining agreement of definite duration does not, in the absence of any provision in the agreement to the contrary, change the at-will nature of the employees' employment thereunder").

The usage and agency theories thus support our position. The third party beneficiary theory goes even further. If adopted with one of its most basic common law features, it would completely foreclose any action based on the collective contract against individual employees. For a third party beneficiary assumes no obligations at all under a contract made for his benefit. See *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 467; *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 210 F. 2d 623, 626, n. 9 (3d Cir. 1954), *aff'd.* 348 U.S. 437.[41] An employer's sole recourse at law for the breach of a no-strike clause would be against the union, the only promisor.

So far we have considered the collective bargaining agreement according to technical common law contractual principles. Obviously this is inadequate as a realistic description of its actual function in the world of labor-management relations. Again and again it has been stressed that a collective agreement is essentially like "a code for the government of an industrial enterprise." *Aeronautical Industrial District Lodge 72* v. *Campbell*, 337 U.S. 521, 528. In *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 202, Mr. Chief Justice Stone commented on behalf of this Court: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." For Professor Cox, this "governmental nature of a collective bargaining agreement should have predominant influence in its interpretation."[42]

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[41] Also see 1 *Contracts Restatement* §§133-136 (1932); 1 Teller, *Labor Disputes and Collective Bargaining* §168, p. 504 (1940) ("our law does not recognize any obligation to rest upon a third party beneficiary").

[42] Cox, *supra* note 12, at 25. See also Commons, *The Economics of Collective Action* 270 (1950) ("so-called collective bargaining is, more accurately, economic legislation by representatives of organized capitalists and organized laborers"); *The Public Interest in National Labor Policy* 32 (Committee for Economic Develop-

Here, surely, is the key to any problem of construction. To the extent individual employees are concerned, a collective contract should be viewed primarily as a code regulating their rights and duties "within the job community."[43] For violations of the rules of that community they are properly subject to the type of discipline that lies within the power of the community. Individuals engaging in work stoppages in the face of a no-strike clause may even "lose their status as employees," *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280, and be discharged.[44] But a no-strike clause should not be deemed to have the intent or effect of subjecting individual employees to legal remedies outside the job community.

Put most simply, this Court can dispose of the precise issue before it by holding that as a matter of federal law a no-strike clause in a union contract will not be interpreted as subjecting individual employees to the drastic, unprecedented remedy of money damages, at least in the absence of a "compelling expression" of such an intent, or "unequivocal words" requiring that result. See *Mastro Plastics*, *supra*, 350 U.S. at 283; *Lewis* v. *Benedict Coal Corp.*, 361

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ment, 1961) ("[a] major achievement of collective bargaining, perhaps its most important contribution to the American workplace, is the creation of a system of industrial jurisprudence, a system under which employer and employee rights are set forth in contractual form and disputes over the meaning of the contract are settled through a rational grievance process usually ending, in the case of unresolved disputes, with arbitration"); Shulman, *supra* note 19, 68 Harv. L. Rev. at 1024 (emphasizing the parties' "continuing relationship," their "going systems of self-government," and their "autonomous system").

[43] Givens, *supra* note 16, 14 Ind. & Lab. Rel. Rev. at 598.

[44] *Ibid.* On the appropriateness of discipline, including discharge, as a penalty for violators of no-strike clauses, and the impropriety or inappropriateness of damage actions, see also Chamberlain, *supra* note 11, 48 Colum. L. Rev. at 842; Beatty, *Labor-Management Arbitration Manual* 92 (1960).

U.S. 459, 471. An abundance of labor policy and legal theory supports this conclusion. And it is wholly consistent with the latest thinking of this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in No. 430 should be reversed.

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February 1962

PETITION FOR A WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 434

SINCLAIR REFINING COMPANY, A CORPORATION,
Petitioner,

vs.

SAMUEL M. ATKINSON, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Sinclair Refining Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 25, 1961.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 290 F. 2d 312 and is printed as Appendix A hereto. The opinion of the District Court for the Northern District of Indiana, Hammond Division, is reported at 187 F. Supp. 225, and is printed as Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered April 25, 1961. On July 19, 1961, by order of Mr. Justice Clark, the time for filing a petition for certiorari was extended to and including September 22, 1961. Jurisdiction of this Court rests on 28 U. S. C., Sec. 1254.

QUESTION PRESENTED.

Whether the Norris-LaGuardia Act, 29 U. S. C. A. 101 *et seq.* precludes injunctive relief against continuance of a course of conduct by which a union and its members utilize strikes to procure settlements of grievances in violation of a labor contract which forbids strikes over them and provides they must be handled through a grievance procedure culminating in compulsory arbitration.

STATUTES INVOLVED.

Labor-Management Relations Act, 61 Stat. 152, 29 U. S. C. 171:

> "That it is the policy of the United States that—
> • • •
>
> "(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and
>
> "(c) certain controversies which arise between

parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies."

Labor-Management Relations Act, as amended, 61 Stat. 153, 29 U. S. C. 173(d):

"(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

Labor-Management Relations Act, as amended, 61 Stat. 156, 29 U. S. C. 185(a):

"(a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C.:

"101. No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this

chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

"104. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined), from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any state;

"(e) Giving publicly to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing

or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

"108. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

STATEMENT.

This case arose out of a series of nine strikes in a 19-month period in violation of a no-strike-compulsory arbitration labor contract in force at a refinery operated by petitioner in East Chicago, Indiana. The contract (A. 15) flatly covenants that "there shall be no strikes or work stoppages: (1) For any cause which is or may be the subject of a grievance * * *"; that "a grievance is defined to be any difference regarding wages, hours or working conditions * * *"; that "when a grievance arises, the following procedure [culminating in compulsory arbitration] must be followed." (A. 15, 25, Art. XXVI.)

The complaint was in three counts. The first prayed damages against the International and Local union caused by the latest of the strikes; the second prayed damages against twenty-four individuals, the third alleged that the strike of February 13-14, 1959, over a pay dispute aggregating $2.19 for three men and which precipitated the suit, was but the culmination of a series of 9 similar illegal strikes or stoppages within a period of 19 months, some of them exceedingly disruptive, and all over work assignments or pay matters that could, and should have

been submitted to the grievance procedure and, if necessary, to arbitration thereunder. It alleged that this evidenced defendants' total disregard of the no-strike covenant and prayed injunctive relief against a continuation of such conduct.

Upon motion to dismiss, the Court of Appeals for the Seventh Circuit held that the law counts were valid, but the injunction count must be dismissed. It held the Norris-LaGuardia Act removed the possibility of use of injunctive powers in any labor dispute absent a contrary "mandate" from Congress. It failed to find such "mandate" in the Labor-Management Relations Act. The Court of Appeals said it was in disagreement with the view of the Court of Appeals for the Tenth Circuit permitting an injunction in *Chauffeurs, Teamsters & Helpers Union No. 795* v. *Yellow Transit Freight Lines,* 282 F. 2d 345, and in agreement with the Court of Appeals for the Second Circuit in *A. H. Bull Steamship Co.* v. *Seafarers' International Union,* 250 F. 2d 326, denying injunctive relief; further, that this Court's decision in *Brotherhood of Railway Trainmen* v. *Chicago River & Indiana Railroad Company,* 353 U. S. 30 authorizing injunctions against strikes over grievances or "minor disputes" where a "reasonable alternative" in the form of an adjudicative settlement was provided, although applicable in industries operating under the Railway Labor Act, is not controlling with respect to industry generally.

REASONS FOR GRANTING THE WRIT.

The question presented is of profound significance in national labor law. The Court so recognized by granting certiorari in *Chauffeurs, Teamsters and Helpers Union* v. *Yellow Transit Lines,* No. 13 this Term, referred to in the Court of Appeals opinion herein. After certiorari was granted in *Yellow Transit* the petitioner there moved

to dismiss on the grounds of mootness. Regardless of what decision may be made as to mootness in *Yellow Transit,* it is suggested certiorari should be granted here because:

If *Yellow Transit* be dismissed as moot this case furnishes the opportunity for settling the basic question which the Court, by its grant of certiorari therein, indicated should be settled.

Even if *Yellow Transit* not be dismissed the writ should be granted here and this case taken with *Yellow Transit* for this case presents another facet of the basic problem: In *Yellow Transit* there was a no-strike clause but "both parties denied the existence of any arbitrable grievance" (282 F. 2d at 350). In this case the existence of both the no-strike clause and arbitrable grievances is clear and uncontested. Therefore, this case clearly presents the question as to whether a contract fashioned in full accord with national policy (29 U. S. C. 171), viz., that collectively bargained agreements contain provision for the final adjustment of grievances, can be enforced in the only way that can make the policy truly effective— through specific enforcement of the covenant not to strike.

Textile Workers v. *Lincoln Mills,* 353 U. S. 448, held that promises to arbitrate contained in labor contracts made under the National Labor Relations Act may be enforced by injunction against an employer—that the ban of the Norris-La Guardia Act was not absolute.

And the ban of Norris-LaGuardia has been lifted further under the Railway Labor Act. *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515, 563; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768 and similar cases hold that the 1934 amendment to the Railway Labor Act cannot be rendered nugatory by the general provisions of the 1932 Norris-LaGuardia Act. This line of authority culminated in *Brotherhood* v. *Chicago & Indiana R. Co.,* 353

U. S. 30, holding that Norris-LaGuardia must be harmonized with Railway Labor, that among the purposes of the latter was the creation of a tribunal, the Railroad Adjustment Board, which would have authority to settle finally disputes over grievances; that a strike for settlement of a grievance ("minor dispute") in the jurisdiction of the Railroad Adjustment Board could be enjoined.

Moving from the railway labor field to that of general industry in which private contracts for binding arbitration are the counterpart of the Railroad Adjustment Board in the railway field, the Court held in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 that an employer's promise to arbitrate contained in a contract made under the National Labor Relations Act may be enforced by injunction—that the ban of the Norris-LaGuardia Act would not apply to such an injunction. That decision was reinforced by subsequent decisions typified by *United Steel Workers* v. *Warrior & Gulf Navigation Co.,* 363 U. S. 574, by which the Court gave impressive strength to the finality of arbitration of grievances under general labor contracts. The Court reemphasized the firmness of national policy that arbitration rather than strikes be utilized to settle interim disputes as to the meaning and application of labor contracts.

The Court of Appeals' opinion in the case at bar would confine the doctrine of *Chicago River* solely to the railway field. We suggest that *Chicago River* expresses the broader philosophy that where the parties have devised special processes for binding adjudication of "minor disputes", or "grievances", arising from a contract that such controversies, grievances or disputes, "are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable substitute" (353 U. S. at 41), and that strikes over them may be enjoined.

We suggest also that the case for an injunction to stop

the economic warfare that raged in this refinery over matters that could have been arbitrated is perhaps stronger than was the case in *Chicago River* for there the defendant union's promise not to strike was not an explicit one as here, but was found to be implicit in the representations made to Congress to procure passage of the Railway Labor Act.

It is petitioner's contention (and that of many competent writers in the field) that the identical policy and legal considerations that impelled the *Chicago River* decision under the Railway Labor Act impel a like decision under the National Labor Relations Act: where there is a contract forbidding strikes and requiring or permitting grievances to go to arbitration, the only effective means of enforcing national policy and the promise to arbitrate is to enjoin strikes which are resorted to in violation of that promise.

The history of Norris-LaGuardia will be read in vain for any indication that Congress by that Act intended to protect any "right" of unions to strike in violation of a contract to arbitrate. There was no such "right" in 1932. Certainly there is none now. The prime purpose of Section 301 of the Labor-Management Relations Act (29 U. S. C. 185) was to secure enforcement of promises not to strike and further to enhance arbitration. Yet to deny an injunction here is to ascribe to Congress an intention in 1932 (and 1947), a fantastic intention of protecting against injunction a "right" to violate a contract made in conformance with national policy. The policy favoring arbitration is not new. It was clearly recognized in Section 8 of Norris-LaGuardia (29 U. S. C. 108, p. 5, *infra*). *Cf. Brotherhood of Railway Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50.

It is suggested that in the cases cited in this petition (and others) this Court has stressed that whatever the

rights of the parties may be to resort to economic warfare over bargainable matters (*Cf. Order of Railroad Telegraphers* v. *Chicago and Northwestern Railway Co.*, 362 U. S. 330, misconstrued in the case at bar), it is national policy that once a contract has been agreed to disputes over its interpretation or application be settled by adjudicative means—Adjustment Board or private arbitration as the case may be. That policy, to be real rather than illusory, must have two legs to stand on rather than one—not only must reluctant employers be forced to arbitrate, but warbent unions must be made to desist.

The importance of the question presented is shown not only by the grant of certiorari in *Yellow Transit* but by the extent of informed professional literature on it and the rather general agreement that Norris-La Guardia, properly construed, does not stand in the way of this limited type of injunctive relief. See *e.g.*, Cox, *"Current Problems in the Law of Grievance Arbitration,"* 30 Rocky Mt. L. R. 247; Gregory, *"The Law of the Collective Agreement,"* 57 Mich. L. R. 635, 645; Hays, *"The Supreme Court and Labor Law, October Term, 1959,"* 60 Col. L. R. 901, 918; Stewart, *"No-Strike Clauses in the Federal Courts,"* 59 Mich. L. R. 673, to mention but a few.

Courts of Appeal are in conflict on the question of vast national importance here presented. The Courts for the 2nd and 7th Circuits, as pointed out in the opinion at bar, are in direct conflict with that for the 10th. District Courts in the 9th (*American Smelting and Refining Company* v. *Tacoma Smeltermen's Union,* 175 F. Supp. 750) and 3rd (*Johnson & Johnson* v. *Textile Workers Union,* 184 F. Supp. 359) Circuits have lined up with the Court of Appeals for the 10th. Clarification by this Court is required.

It is respectfully prayed that the writ issue and that if No. 13 this Term be not dismissed this case be heard with it.

Respectfully submitted,

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September 20, 1961.

APPENDIX A.

OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Before SCHNACKENBERG, CASTLE and MAJOR, *Circuit Judges.* CASTLE, *Circuit Judge.*

Sinclair Refining Company, plaintiff-appellant, hereinafter referred to as plaintiff, commenced this action in the District Court. It seeks damages for alleged breach of a no-strike clause of a collective bargaining agreement; a declaration of rights; and a permanent injunction.

Count I of the complaint invokes jurisdiction under Section 301 of the Labor-Management Relations Act (29 U. S. C. A. § 185); names Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Local No. 7-210 of Oil, Chemical and Atomic Workers International Union, AFL-CIO, as defendants; alleges in substance that the International and Local constitute the recognized collective bargaining agent for approximately 1700 production and maintenance employees in a bargaining unit confined to plaintiff's East Chicago, Indiana, refinery, and that said Unions by their officers, committeemen and other agents caused a strike or work stoppage by approximately 999 of the employees within the bargaining unit on February 13 and 14, 1959 over asserted pay claims of three members, aggregating $2.19, and which were arbitrable under the grievance procedure of the current collective bargaining agreement, and that the work stoppage was in violation of the no-strike clause of the agreement and caused damages to plaintiff by way of out-of-pocket expenses in the amount of $12,500.00 for which recovery is sought.

Count II is based on diversity. It names as defendants 24 individuals, employees of plaintiff at the East Chicago refinery, who are committeemen of the Local and agents of the International. It incorporates the allegations of Count I concerning the collective agreement and it seeks damages from the individual defendants in the same amount and for the same work stoppage. It alleges that the individual defendants "contrary to their duty to plaintiff to abide by said contract, and maliciously confederating and conspiring together to cause the plaintiff expense and damage, and to induce breaches of the said contract, and to interfere with performance thereof by said labor organizations and the affected employees, and to cause breaches thereof, individually and as officers, committeemen and agents of the said labor organizations, fomented, assisted and participated" in the strike or work stoppage.

Count III is based on diversity with respect to the same 24 individual defendants named in Count II and asserts jurisdiction under Section 301 of the Labor-Management Relations Act (29 U. S. C. A. § 185), as well as diversity, with respect to the Local and International Unions. In addition to the allegations of Counts I and II it alleges eight previous strikes or work stoppages at the East Chicago refinery during the term of the current collective agreement over matters subject to its grievance procedure and provisions for arbitration, damaging plaintiff greatly in excess of $10,000.00. It seeks a declaration of the validity and enforceability of the no-strike and grievance provisions of the contract and a permanent injunction restraining and enjoining all of the defendants "from aiding, abetting, fomenting, advising, participating in, ratifying, or condoning any strike, stoppage of work. slowdown or any other disruption of, or interference with normal employment or normal operation or production by any employee within the bargaining unit at plaintiff's East Chi-

cago, Indiana, refinery" covered by the current collective agreement "in support of, or because of, any matter or thing which is, or could be, the subject of a grievance under the grievance procedure of said contract, or any extension thereof, or any other contract between the parties which shall contain like or similar provisions".

The defendants filed a motion to dismiss and a motion to stay. The District Court denied the motion to stay and denied the motion to dismiss as to Count I (action against Unions for damages) but granted the motion to dismiss and entered judgment dismissing Counts II (action against individual defendants for damages) and III (declaratory and injunctive relief).

The plaintiff appealed the dismissal of Counts II and III.[1] The defendants appealed the denial of the motion to stay.[2] The plaintiff's appeal (Nos. 13092 and 13136) has not been consolidated with defendants' appeal (No. 13137). However, to avoid unnecessary repetition we elect to treat them as consolidated for the purpose of disposition in one opinion.

The main contested issues presented by plaintiff's appeal are:

(1) Whether 29 U. S. C. A. § 185 precludes suit for recovery of damages from individual union officer-company employees for inducing or participating in a strike or work stoppage in violation of a no-strike clause of a collective bargaining agreement covering the unit to which they belong.

(2) Whether 29 U. S. C. A. § 101 precludes injunc-

1. Plaintiff states that in order to avoid any question of finality of the District Court's orders both an interlocutory appeal (No. 13092) and a regular appeal (No. 13136) were perfected. Plaintiff's appeals have been consolidated.

2. Defendants' appeal was perfected pursuant to 28 U. S. C. A. § 1292(a) (1).

tive relief to restrain a future breach of a no-strike clause of a collective bargaining agreement.

Those presented by defendants' appeal are:

(1) Whether the collective bargaining agreement here involved required the employer to submit to arbitration any claim he might make for damages caused by breach of the agreement's no-strike clause.

(2) Had the employer submitted the claim to arbitration?

We will first consider the issues raised by defendants' appeal. The defendants contend that since the cause of action against the Local and International is based on an alleged violation of the no-strike clause of the collective agreement, the dispute is first subject to adjustment and determination under the arbitration procedure of the agreement and that no action can be brought until these procedures are exhausted. Defendants further contend that the causes of action against all of the defendants must be stayed until a determination of the issues raised in pending arbitrations is made because such issues are the same as those "which the plaintiff has sought the court to decide under the allegations of its complaint". This latter contention is based in part on the contents of an affidavit filed in support of the motion to stay. The affidavit recites that as a result of the work stoppage which occurred February 13 and 14, 1959 certain grievances are pending, pursuant to the grievance and arbitration procedure of the contract, involving disciplinary action taken against some of the individual defendants for allegedly fomenting, assisting and participating in such strike or work stoppage, and that the disputes which caused the eight previous work stoppages referred to in Count III of plaintiff's complaint have all been disposed of pursuant to the grievance procedure of the contract except the question of the compensation of

one worker, which is the subject of a pending grievance. A counter-affidavit filed by plaintiff discloses that the grievances of the individual defendants were filed subsequent to the work stoppage of February 13 and 14, 1959 and involve either the three pay claims aggregating $2.19 concerning deductions made by the plaintiff from compensation of the employees because of their reporting for work late, which deductions allegedly caused the work stoppage, or relate to the plaintiff's refusal to compensate individual defendants for time spent processing grievances contrary to disciplinary restrictions imposed by plaintiff, because of the work stoppage, on their engaging in such activity. It is further recited that the parties have been unable to agree on a settlement or disposition of the grievances, that both the Union and the plaintiff have named arbitrators but that a third or impartial arbitrator had not as yet been selected.

The collective bargaining agreement here involved is for a term beginning June 15, 1957 and continuing to June 14, 1959 and thereafter unless terminated by either party on sixty days' written notice. The agreement contains both a no-strike clause and an arbitration clause.

The no-strike clause is as follows:

> "Union further agrees that during the term of this Agreement there shall be no strikes or work stoppages:
> "(1) For any cause which is or may be the subject of a grievance under Article XXVI of this Agreement, or
> "(2) For any other cause, except upon written notice by Union to Employer provided:
> "(a) That Employer within thirty (30) days from the receipt of such notice will meet with the representatives of the Union and endeavor to reach an agreement on the matter in dispute.
> "(b) In the event an agreement is not reached within forty-five (45) days after the expiration of the

> thirty (30) day period specified in (a) hereof, Union, upon the expiration of such forty-five (45) day period, may exercise its right to strike by serving fifteen (15) days' notice in writing upon Employer of Union's intention to strike at the expiration of such notice."

Article XXVI of the agreement sets forth the grievance and arbitration procedure. It defines "grievance" as follows:

> "A grievance is defined to be any difference regarding wages, hours, or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operation."

The Article then sets forth detailed provisions as to how "grievances" are to be processed and considered culminating with provisions for arbitration if the grievance is not resolved at one of the earlier stages of the procedure.

We are mindful of the congressional policy in favor of the settlement of disputes in the labor-management field through the machinery of arbitration. This was recognized in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 456, 77 S. Ct. 912, 1 L. Ed. 2d 972, and since reconfirmed in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582-583, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409, in which the Supreme Court admonished that in the interpretation of arbitration clauses of collective bargaining agreements "[d]oubts should be resolved in favor of coverage". Nevertheless Warrior also affirms that "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit".

Defendants' reliance upon *Warrior* and the similar teachings found in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed.

2d 1403 and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424, is misplaced. The arbitration clause here under consideration contracts to submit to arbitration only a grievance which is a "difference regarding wages, hours or working conditions". The claim of the employer for damages relates to neither wages, hours nor working conditions. It does not involve a subject which it has contracted to submit to arbitration. The arbitration clauses considered in *Warrior* and *American Manufacturing* were broad in scope. They called for arbitration of all disputes or differences as to the "meaning" and "application" of the agreement. Likewise distinguishable by reason of the broad scope of the arbitration clauses involved are *Signal-Stat Corp.* v. *Local 475, United Electrical, Radio and Machine Workers*, 2 Cir., 235 F. 2d 298; *Tenney Engineering, Inc.* v. *United Electrical, Radio and Machine Workers*, 3 Cir., 207 F. 2d 450 and *Lewittes & Sons* v. *United Furniture Workers*, D. C. S. D. N. Y., 95 F. Supp. 851 cited by defendants. We conclude that giving the language of the arbitration clause here under consideration its broadest scope it is not susceptible of an interpretation that covers the asserted dispute. *Cf. Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers, International, AFL-CIO*, 2 Cir., 287 F. 2d 155; *International Union United Furniture Workers of America* v. *Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33, 35; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34*, 7 Cir., 235 F. 2d 108, 111, certiorari denied 352 U. S. 912, 77 S. Ct. 149, 1 L. Ed. 2d 119; *United Electrical, Radio and Machine Workers of America* v. *Miller Metal Products, Inc.*, 4 Cir., 215 F. 2d 221; *Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, etc. Union*, 6 Cir., 217 F. 2d 49, 53; *International Union, etc.* v. *Benton Harbor Malleable Industries*, 6 Cir., 242 F. 2d 536, 540-541, certiorari denied 355 U. S. 814, 78 S. Ct. 15, 2 L. Ed. 2d 31.

Nor are we impressed with defendants' contention that because certain grievances of the individual defendants have been submitted to arbitration under the provisions of the agreement plaintiff is bound to submit its claim for damages to arbitration. The employee grievances involve the pay deductions which precipitated the work stoppage and disciplinary restrictions imposed for participation therein. That some of the underlying issues which are or may become involved in the determination of those grievances may also possibly become an issue to be resolved in the ultimate adjudication of plaintiff's suit—the issues of which are yet to be framed by pleadings as yet unfiled—does not in our opinion require a stay of plaintiff's action. Plaintiff has not submitted the subject matter of its action to arbitration, nor consented to such arbitration, merely because in conformity with its contract it is arbitrating employee grievances which involve some factors or "issues" in common with those which could possibly arise in the suit. The fact that a grievance under arbitration and a court action may share some issue or factor in common does not establish identity of subject matter. What plaintiff has submitted to arbitration under its contract to arbitrate are matters different from the subject matter of its suit. It has not agreed to arbitrate the latter —and submission to arbitration is a matter of contract.

We conclude that the District Court did not err in denying a stay of plaintiff's action.

The District Court's dismissal of Count II of the complaint was based on the view that under Section 301 of the Labor-Management Relations Act (29 U. S. C. A. § 185)[3] suits of the nature alleged in Count II are no

3. Hereinafter referred to as Section 301, and which, in so far as pertinent, reads as follows:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between

longer cognizable in state or federal courts. In our opinion the District Court erred in so concluding and in dismissing Count II. The 24 individuals named in Count II are employees of the plaintiff as well as members and officers of the Local Union and agents of the International. They were in the bargaining unit covered by the collective agreement. Whether these individuals are regarded "somewhat as" third party beneficiaries to the collective contract[4] or that contract, though not signed by or naming them, is one directly between them and the employer, negotiated by their agent, because incorporated in the individual contract of hire[5] they are bound by its provisions. *Young* v. *Klausner Cooperage Co.*, 164 Ohio St. 489, 132 N. E. 2d 206; *Owens* v. *Press Publishing Co.*, 20 N. J. 537, 120 A. 2d 442; *McLean Distributing Co.* v. *Brewery and Beverage Drivers et al.*, 254 Minn. 204, 94 N. W. 2d 514, certiorari denied 360 U. S. 917, 79 S. Ct. 1436, 3 L. Ed. 2d 1534. The individual defendants are bound by the no-strike clause of the agreement. We do not mean to imply that the individual defendant is liable for breaches by others

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any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets. • • •"

4. *Cf. J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332, 336, 64 S. Ct. 576, 88 L. Ed. 762.

5. *Cf. Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 3 Cir., 210 F. 2d 623, 627, affirmed 348 U. S. 437, 75 S. Ct. 488, 99 L. Ed. 510.

which he did not induce but he is liable for his own breach and any he does induce. And we recognize that each of the individual defendants may have no duty to remain in plaintiff's employ for any given period. But, under the contract, he does have a binding contractual obligation not to strike or engage in a work stoppage in violation of the no-strike clause. And he has a duty not to induce others to do so.

Count II alleges individual breaches by the 24 named defendants as well as their inducement of individual breaches by other employees. The 24 defendants are union officers presumably familiar with the terms of the agreement, including its no-strike clause. In considering a motion to dismiss, the allegations of the complaint must be viewed in the light most favorable to the plaintiff, and all facts well pleaded must be admitted and accepted as true. *Conley* v. *Gibson,* 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. And we are not now concerned with what defenses might exist; what issues may be framed by subsequent pleading, nor with what the proof to be adduced may establish as to liability or nonliability of any of the defendants. If any set of facts provable under the allegations of Count II warrants recovery under accepted principles of law it states a cause of action. *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.,* 7 Cir., 257 F. 2d 417.

Count II seeks to hold the individual defendants liable for their own acts in breach of the contract. They are under a contractual obligation not to participate in a strike or work stoppage in violation of the no-strike clause. The Count alleges such participation.

In addition Count II alleges that the individual defendants induced other employees to breach the agreement. Indiana, under the doctrine of *Lumley* v. *Gye,* 2 El. & Bl. 216, 118 Eng. Reprint 749, recognizes liability for malicious

interference with or inducement of breach of a contract and it has applied that doctrine in a situation where a defendant charged with inducing a breach of contract is a party to the contract. *Wade* v. *Culp, 107 Ind. App.* 503, 23 N. E. 2d 615.[6]

Thus, apart from alleging a contract liability of each individual defendant for participating in a work stoppage in violation of his contractual obligation not to do so, Count II also alleges a tort liability recognized under Indiana law—tortious interference with and inducement of breach of contract obligations.

We are unable to agree with the defendants that Section 301 precludes assertion of the liability of individual employees bound by a collective agreement for participating in or inducing a work stoppage in violation of the agreement's no-strike clause where the union is being sued for an alleged breach in connection with the same work stoppage. The provision that a judgment against a labor organization shall not be enforceable against its members does not in and of itself preclude action against or recovery from individual members for their individual breaches of contract. Of course there can be but one satisfaction. The observation in *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 470, 80 S. Ct. 489, 496, 4 L. Ed. 2d 442, relied upon by defendants, that Section 301 evidences a congressional intention that the union, like a corporation, should be the sole source of recovery was made with respect to an "injury inflicted by it", and in an entirely different context from that here involved. There are strikes or work stoppages without union participation, without the union

6. In *Wade* v. *Culp* the defendant, Wade, a party to the contract, was sued along with other defendants, strangers to the contract, for interfering with and inducing a breach. *Cf. Worrie* v. *Boze*, 198 Va. 533, 95 S. E. 2d 192, 63 A. L. R. 2d 1315 and *Motley, Green & Co.* v. *Detroit Steel & Spring Co.*, C. C. S. D. N. Y., 161 F. 389.

having "called a strike" or being responsible therefor. And there can be work stoppages caused and participated in by some employees but not others.

Defendants place heavy reliance on *San Diego Building Trades Council, etc.* v. *Garmon,* 359 U. S. 236, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775. But that case involved a determination of whether a state court had jurisdiction to award damages arising out of a union activity—peaceful recognition picketing—which the Supreme Court found "arguably within the compass of § 7 or § 8 of the [National Labor Relations] Act"[7] and thus within a narrow area withdrawn from possible state activity and within which state jurisdiction must yield. The conduct of the individual defendants alleged in Count II of the complaint in the instant case is neither a protected activity under § 157 nor an unfair labor practice embraced within the scope of § 158 of 29 U. S. C. A. A strike or work stoppage in violation of a no-strike clause of a collective bargaining agreement is not an activity protected by federal law. And as conflict is the touchstone of pre-emption the rationale of *Garmon* is inapplicable to bar prosecution of Count II.

In *Wilson & Co.* v. *United Packinghouse Workers of America,* D. C. Iowa, 181 F. Supp. 809, relied on by defendants, the individual defendant officers of the union were sued individually and as representative of the class and membership of the Local Union in a count sounding in tort only, the claimed tort (at page 818) "being the inducing of a breach of the collective bargaining agreement." Unlike Count II of the complaint here under consideration the individual defendants were not sued in a count sounding in contract as well as in tort. But, apart from these differences, we are not disposed to follow the holding of *Wilson* that Section 301 precludes maintenance of an action for inducement of breach of contract against

7. 29 U. S. C. A. §§ 157 and 158.

the union officers where the union also is sued for breach of contract under Section 301. That the individual defendants in Count II are officers of the Union defendants sued in Count I does not in our judgment insulate them from liability as employees of plaintiff, a status they also occupy, on the theory advanced by defendants and employed in *Wilson* that as officers of the Union they should be immune from liability for inducing a breach of *its* contract. The doctrine of *Hicks* v. *Haight*, 171 Misc. 151, 11 N. Y. S. 2d 912, that an officer of a corporation is not liable for inducing a breach of the corporation's contract is relied on by analogy to support the claimed immunity. But the New York rule is not without its limitations and is not recognized in a number of jurisdictions (Fletcher on Corporations, Vol. 3, 1947 Rev. Ed. § 1001, pp. 501, 502 and 1960 Cum. Supp. pp. 56-58). In addition the no-strike clause of the collective agreement is binding on the individual defendants as employees whereas the officers or stockholders of a corporation are not personally obligated on a contract of the corporation. A concise answer to *Wilson* is found in *Baun* v. *Lumber and Sawmill Workers Union et al.*, 46 Wash. 2d 645, 284 P. 2d 275, 286, where it was succinctly pointed out:

> "What the statute relied on [Section 301] says * * * is that a judgment against a labor organization shall not be enforcible against its members, which is a far cry from saying that a judgment cannot be recovered against individual members in consequence of their individual actions. The argument is a complete *non sequitur.*"

It is our considered judgment that Count II stated a cause of action cognizable in the courts of Indiana and, by diversity, maintainable in the District Court. It was error to dismiss Count II.

The District Court's dismissal of Count III was predi-

cated on its conclusion that the Norris-LaGuardia Act[8] precludes the injunctive relief sought. Plaintiff seeks a permanent injunction operating *in futuro* against all of the defendants, and all to whom notice thereof might come, restraining them from any disruption of or interference with normal employment, operation or production in connection with any dispute which might be the subject of a grievance under the grievance procedure of the collective agreement, or any extension thereof, or any other such agreement containing like or similar provisions.

Norris-LaGuardia, subject to exceptions not here pertinent, withdraws jurisdiction from federal courts to issue an injunction in a case involving or growing out of a labor dispute. It is clear from the specific allegations of Count III that the conduct and work stoppages sought to be restrained are those which result from or involve labor disputes—differences concerning "wages, hours or working conditions" which are subject to the grievance and arbitration procedures. And the relief sought would clearly prohibit persons "participating or interested in such [a] dispute" from "[c]easing or refusing to perform any work * * *."

In *Order of Railroad Telegraphers et al.* v. *Chicago & North Western Railway Co.*, 362 U. S. 330, 335, 80 S. Ct. 761, 764, 4 L. Ed. 2d 774, the Supreme Court after referring to the prohibitions of Section 4 of the Norris-LaGuardia Act and observing that said Act defines a labor dispute as including "any controversy concerning terms or conditions of employment * * *" stated:

> "Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the

8. 29 U. S. C. A. § 101 and § 104.

language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted."

It is implicit in the teachings of *Railroad Telegraphers* that it is not within a court's prerogatives to impose limitations on the clearly expressed congressional policy embodied in Norris-LaGuardia and that the Act removed the possibility of use of injunctive powers in any labor dispute absent a contrary mandate from the Congress. In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622, relied upon by the plaintiff, the Court had earlier found such a mandate to exist in the need to accommodate Norris-LaGuardia and the Railway Labor Act, 45 U. S. C. A. § 151 *et seq.* so that the obvious purpose of each of the statutes adopted as a pattern of labor legislation is preserved. The exception to the ban of Norris-LaGuardia there recognized was grounded on explicit provisions of the Railway Labor Act subjecting "minor disputes" to compulsory arbitration and declaring the Adjustment Board's decision "binding" upon both parties in order to avoid any interruption of transportation and attendant injury to the public because of such class of disputes. *Railroad Telegraphers* affirms that the doctrine of *Chicago River* operates within the narrowly confined limits of those requirements and does not even encompass other disputes in the field of railway labor-management so as to authorize injunctive relief against strikes or work stoppages involving other matters. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528, 80 S. Ct. 1326, 4 L. Ed. 2d 1379.

Thus *Chicago River* is not a controlling precedent here and on the facts here alleged we find no mandate in Section 301 to which Norris-LaGuardia must accommodate. *Lincoln Mills* does not say that Section 301 authorizes injunctive

relief clearly prohibited by Norris-LaGuardia. Compelling arbitration is not prohibited by Norris-LaGuardia—enjoining strikes or work stoppages is. And there is nothing in the general language of Section 301, nor its purposes, as disclosed by the legislative history,[9] which evidences conflict with Norris-LaGuardia.

In so concluding we find ourselves in disagreement with *Chauffeurs, Teamsters and Helpers Local Union No. 795* v. *Yellow Transit Freight Lines*, 10 Cir., 282 F. 2d 345,[10] but supported by *A. H. Bull Steamship Co.* v. *Seafarers' International Union*, 2 Cir., 250 F. 2d 326.

Plaintiff contends that inasmuch as Count III contained a prayer that the court "declare the rights of the parties" it was error for the District Court to dismiss the Count even though injunctive relief is barred. We perceive no error in this connection. Count III does pray a declaration that the no-strike and grievance procedure clauses are legal, binding and enforceable. But no allegation is made that a controversy exists between the parties as to the validity or enforceability of either clause. The Count sets forth alternative conclusions that the conduct of defendants "shows" either that they do not regard the provisions valid and binding or deliberately violated them. Such allegation fails to charge the existence of controversy over validity or enforceability requisite to support an action for declaratory judgment.

The thoroughness of the briefs of the parties has been of material aid to the Court and although we have not made specific reference to some of the many authorities cited and analyzed therein we have considered each of the arguments advanced by the parties in support of their

9. See legislative history appended to Lincoln Mills, 353 U. S. 448, 485-546, 77 S. Ct. 912, 923 1 L. Ed. 2d 972.

10. Certiorari granted 364 U. S. 931, 81 S. Ct. 378, 5 L. Ed. 2d 364.

respective positions on the issues and discussed those we deemed necessary.

We conclude that the District Court did not err in denying the motion to stay the action nor in dismissing Count III of the complaint but did err in dismissing Count II.

In Appeal No. 13137 the order of the District Court denying defendants' motion to stay is affirmed.

In Appeal Nos. 13092 and 13136 the portion of the judgment order of the District Court dismissing Count III of the complaint is affirmed and that portion of the judgment order dismissing Count II of the complaint and dismissing all individual defendants from the action is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

No. 13137 affirmed, Nos. 13092 and 13136 affirmed in part, reversed in part and remanded.

APPENDIX B.

OPINION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA.

SWYGERT, *Chief Judge.*

The matter is before the court principally on a motion to vacate its order of March 12, 1960, and to grant a rehearing on several motions which were the subject of the March 12th order.

A rehearing has been afforded the defendants. After oral argument and submission of briefs on the motion for rehearing, I have come to the conclusion that the March 12th order should be vacated and a new order entered which modifies substantially the older order. A memorandum setting forth the reasons for the new order seems appropriate.

Dismissal of Count I.

As I understand defendants' contention, it is that if there are possibly protected or prohibited union activities under §§ 7 and 8 of the Labor Management Relations Act, 29 U. S. C. A. §§ 157, 158 involved in the factual situation whereby the "no-strike" agreement was alledgedly breached, the court cannot entertain jurisdiction under § 301 of the Act, 29 U. S. C. A. § 185. They cite *San Diego Bldg. Trades Counsel* v. *Garmon,* 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775, and *Plumbers, etc.* v. *County of Door,* 359 U. S. 354, 79 S. Ct. 844, 3 L. Ed. 2d 872.

The *Garmon* and *Door* cases dealt with pre-emption of state-court jurisdiction where there were present or arguably present protected or prohibited union activities which

came within the jurisdiction of National Labor Relations Board under §§ 7, 8 and 10 of the Act, 29 U. S. C. A. §§ 157, 158, 160. Neither case presented the problem of a conflict between the jurisdiction of the Board and the courts because of a possible overlap of activities protected or prohibited by §§ 7 and 8 and at the same time the basis for a violation of a labor contract enforceable under § 301.

The alleged violation of a collective bargaining contract is the basis of Count I. There is nothing in the record at this point to indicate that the events claimed to constitute a violation of the contract also involved either protected or prohibited activity. But even the presence of such activities would not give preferential jurisdiction to the Board and oust that of the courts. The responsibility of enforcing labor contracts lies in the courts; otherwise there would have been no need for enacting § 301.

Dismissal of Count II.

The Court's attention has been called to two cases not considered at the time the motion to dismiss was originally ruled upon, *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 80 S. Ct. 489, 4 L. Ed. 2d 442, and *Wilson & Co.* v. *United Packinghouse Wkrs. of America,* D. C. N. D. Iowa, 1960, 181 F. Supp. 809.

Judge Graven in the *Wilson* case, after an exhaustive discussion of the identical problem, concluded that the officers of the labor union are not individually liable for the inducement of a breach of a collective bargaining contract where the union is being sued under § 301 of the Taft-Hartley Act for the breach. In his opinion, Judge Graven cited the *Lewis* case in support of his conclusion. In that case the Supreme Court in the majority opinion stated [361 U. S. 469, 80 S. Ct. 495]:

"Section 301(b) of the Taft-Hartley Act, 29 U. S.

> C. A. § 185(b), provides that 'any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.' At the least this evidences a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it. * * *."

It is clear from the language in the *Lewis* case that a labor union when sued under § 301 must be treated as if it were a corporation. It is also made clear that union members or officers cannot be held individually liable for acts of the union, as, similarly, stockholders and officers of a corporation are not liable for corporate acts.

It is generally the law that officers and employees of a corporation cannot be held liable for inducing a breach of its contract. *Wilson & Co.* v. *United Packinghouse Wkrs. of America, supra;* 30 Am. Jur., Interference § 37; *Hicks* v. *Haight,* 171 Misc. 151, 11 N. Y. S. 2d 912 (1939); 26 A. L. R. 2d 1270. By analogy, and having in mind the language in the *Lewis* case, a union member or officer cannot be held liable for inducing the breach of a union contract.

The fact that Count II is based on diversity jurisdiction is not determinative of the motion. Section 301 is more than a procedural statute; it is also substantive. The section is the statutory source of federal law governing remedies for violations of collective bargaining contracts. *Textile Wkrs., etc.* v. *Lincoln Mills of Alabama,* 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972.

Drawing, then, from general corporate law, and relating it to suits for breaches of collective bargaining contracts under § 301 as that section has been construed by the Supreme Court, the conclusion is inevitable that suits

of the nature alleged in Count II are no longer cognizable in state or federal courts.

Dismissal of Count III.

Plaintiff urges that since Lincoln Mills allowed specific enforcement of the agreement to arbitrate the case now compels specific enforcement of the no-strike agreement received in exchange for the promise to arbitrate. It contends that the Norris-LaGuardia Act should not preclude injunctive relief in the case at bar because the conditions which prompted passage of that Act no longer obtain.

That the suit at bar involves a labor dispute within the meaning of § 13(c) of the Norris-LaGuardia Act, 29 U. S. C. A. § 113(c), is beyond dispute. That it also involves an alleged breach of a no-strike clause of a collective bargaining agreement does not alter the fact a labor dispute exists under the definition of § 13(c) of the Act. *A. H. Bull Steamship Co.* v. *National-Marine Eng. B. Ass'n,* 2 Cir., 250 F. 2d 332.

Since the original ruling on the motion to dismiss Count III, the Supreme Court decided *Order of Railroad Telegraphers et al.* v. *Chicago & N. Western R. Co.,* 362 U. S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774. In that case the Supreme Court left no doubt that § 4 of the Norris-LaGuardia Act, 29 U. S. C. A. § 104 withdraws jurisdiction from the federal courts to issue injunctions to prohibit the refusal "to perform work or remain in any relation of employment" in cases involving *any* labor dispute.

Upon reconsideration and in light of the opinion in Railroad Telegraphers, I have come to the conclusion that Lincoln Mills does not remove the sweep of the Norris-LaGuardia Act so as to permit the specific enforcement of a no-strike clause in a labor contract.

Motion to Stay.

Defendants seek a stay of the action on the ground that certain grievances filed as the result of the strike or work stoppage alleged in the complaint are subject to arbitration in accordance with the procedure outlined in the contract. In my opinion the resolution of these grievances by arbitration would not decide whether there was a strike or work stoppage and whether there occurred thereby a breach of the contract by the union which promised not to permit work stoppages or strikes over matters which are subject to arbitration. Lincoln Mills permits a labor union to sue under § 301 for specific performance of a promise by the employer to arbitrate grievances defined in the collective bargaining agreement. For similar reasons, the employer has the right under § 301 to sue the union for a violation of the no-strike clause.

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347, 1353, the majority opinion said in part:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate."

Paraphrasing the above language, Congress by § 301 assigned to the courts the duty of determining whether the union has breached its promise not to strike over arbitrable grievances.

The arbitration of grievances filed by union members over disciplinary action taken by the company as a result of the alleged strike involves issues quite distinct from the issue whether the union violated its contract. For that reason the motion to stay must be denied.

JUDGMENT SOUGHT TO BE REVIEWED.

Sinclair Refining Company,
Plaintiff-Appellant,
Nos. 13092, 13136
vs.
Samuel M. Atkinson, et al.,
Defendants-Appellees.

Sinclair Refining Company,
Plaintiff-Appellee,
No. 13137 *vs.*
Samuel M. Atkinson, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from in Appeal No. 13137 be, and the same is hereby affirmed.

It is further ordered and adjudged by this Court that in Appeal Nos. 13092 and 13136 that portion of the judgment order of the District Court dismissing Count III of the complaint be, and the same is hereby, Affirmed, and that portion of the judgment order dismissing Count II of the complaint and dismissing all individual defendants from the action be, and the same is hereby, Reversed, and that this cause be, and it is hereby Remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs on these appeals be taxed in favor of Plaintiff, Sinclair Refining Company, and against the Defendants, Samuel M. Atkinson, et al.